Supreme Court, U.S.
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In The
Supreme Court of the United States

In Re: BETTY I. FRENCH,

Debtor.

RANDY LEE FRENCH;
DONNA MARIE SHAKA,

Petitioners,

v.

GEORGE W. LIEBMANN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in holding that 11 U.S.C. § 548 could be applied extraterritorially so as to avoid a transfer of real estate situated in the Commonwealth of the Bahamas, in light of the historical precedent against the exercise of jurisdiction in that manner and in light of the presumption that United States Statutes must receive domestic application only in the absence of clear evidence of Congressional intent to the contrary; and did the Fourth Circuit err in finding Congressional intent to apply § 548 extraterritorially?

Did the United States Court of Appeals err in its consideration of the Petitioners' request that the Court refrain from exercising jurisdiction to avoid a transfer of real estate situate in the Commonwealth of the Bahamas under the doctrine of international comity where the transfer could not have been avoided under Bahamian law, where a Bahamian court is unlikely to give effect to the judgment of a United States court on the issue of avoiding the transfer, and where a Bahamian court would have applied the law of the situs jurisdiction to decide all such issues?

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONERS

Petitioners are individuals; therefore no corporate disclosure is necessary.

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Randy L. French and Donna Marie Shaka respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled proceedings on February 14, 2006.

OPINIONS BELOW

1. The Opinion of the United States Court of Appeals for the Fourth Circuit dated February 14, 2006, as amended on February 16, 2006, is reported at 440 F.3d 145 (4th Cir. 2006). The Orders entered in conjunction with this opinion, dated February 14, 2006, and February 16, 2006, are reproduced at App. 70 and App. 1, *infra,* respectively.

2. The Opinion of the United States District Court for the District of Maryland dated December 8, 2004, is reported at 320 B.R. 78 (D. Md. 2004) and is reproduced at App. 20, *infra*; the Order entered December 8, 2004, in conjunction with this Opinion, is reproduced at App. 19, *infra.*

3. The Opinion of the United States Bankruptcy Court for the District of Maryland denying Appellants' motion to dismiss, dated October 8, 2003, is reported at 303 B.R. 774 (Bkrtcy. D. Md. 2003) and is reproduced at App. 47, *infra*; the Order entered in conjunction with this Opinion, also dated October 8, 2003, is reproduced at App. 45, *infra.*

4. The Memorandum Opinion of the United States Bankruptcy Court for the District of Maryland granting summary judgment dated April 21, 2004, is unreported and reproduced at App. 37 *infra*; the Order entered in conjunction with this Opinion, also dated April 21, 2004, is reproduced at App.35, *infra.*

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case primarily concerns a clash between the law of the United States and that of a friendly nation, the Commonwealth of the Bahamas, as a result of the extraterritorial application of Section 548 of the Bankruptcy Code (11 U.S.C. § 548) to avoid and thus invalidate a transfer of real estate located in the Bahamas which was not defeasible under Bahamian law. The pertinent portions of this statute are reproduced at App. 74, *infra.*

Other related portions of the Bankruptcy Code involved with this case include 11 U.S.C. § 541, pertinent portions of which are reproduced at App. 71, *infra;* 11 U.S.C. § 544, an extract of which is reproduced at App. 72, *infra*; 11 U.S.C. § 547, an extract of which is reproduced at App. 73, *infra;* and 11 U.S.C. § 550, an extract of which is reproduced at App. 75, *infra.* This case also involves the exercise of bankruptcy court jurisdiction, which in part is provided for in 28 U.S.C. § 1334(e), which is reproduced at App. 77, *infra.*

Finally, also involved with this case are two Bahamian statutes. The Fraudulent Dispositions Act 1991, which governs actions to set aside a fraudulent transfer, is reproduced at App. 109, *infra.* Chapter 175 of the Statute Law of the Bahamas, the Registration of Records Act, is concerned with the recordation of deeds to real property in the Bahamas and, in pertinent part, is reproduced in App. 112, *infra.*

STATEMENT OF THE CASE

The facts of the case were as stated in the opinion of the Court of Appeals. In 1976, Betty Irene French, a Maryland resident, purchased a residence in Nassau, Bahamas. Subsequently, she gave that residence to her two children, the Petitioners Randy Lee French and Donna Marie Shaka. The conveyance was effectuated by a deed of gift and by an indenture, prepared according to Bahamian law, which was attested to and was then delivered to Randy and Donna at a Christmas party held in Maryland on December 25, 1981.

The owner of the property previous to Betty French, a Bahamian senator, advised Randy and Donna not to record the deed; under Bahamian law, he told them, the conveyance was final and complete upon delivery of the deed; and he further advised them that, because of high transfer taxes which were charged upon recordation, deeds commonly were not recorded. Following this advice, Randy and Donna did not record the deed at once but simply retained it in their possession for several years.

In the late 1990's, Betty French and her husband, Elwood Dean French, found themselves in serious financial trouble. Concerned over the possibility that the property might somehow become involved, Randy and Donna decided to record the deed. They retained a Bahamian attorney to handle the recordation and paid the necessary taxes and fees; and the deed was then recorded with the Office of the Registrar in the Bahamas on June 21, 2000.

The senior Frenches' financial difficulties came to a head with the filing of a voluntary Chapter 7 petition by Elwood French in September 2000. This was soon followed by the filing of an involuntary petition against

Betty French in October 2000; and an order for relief was entered against Mrs. French on January 29, 2001.

On August 22, 2002, Mrs. French's bankruptcy trustee, George Liebmann, filed an adversary proceeding seeking to avoid the transfer of the Bahamas property under § 548 of the Bankruptcy Code and seeking to recover the property or its value from the Petitioners for the benefit of the Chapter 7 estate under § 550. In pertinent part, the complaint alleged that Appellants were the recipients of a constructively fraudulent transfer of the debtor's property, made without fair consideration at a time when the debtor was insolvent, within the year prior to the petition date.[1] The complaint alleged that the date of recordation of the deed should be deemed to be the date of the transfer under Section 548(d)(1) because it was only at that time that the transfer became so far perfected, under local law, that the transferees (Petitioners) acquired rights superior to any competing purchaser.[2]

The parties were in agreement as to the material facts of the case. It was acknowledged that there had been no consideration for the transfer and that Mrs. French had been insolvent at the time the deed was recorded. However, Petitioners moved to dismiss the complaint on two grounds. First, Petitioners argued that

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[1] The Complaint also contained allegations of intentional fraud, but these were never ruled on by the Bankruptcy Court because of the finding on summary judgment that the transfer was constructively fraudulent.

[2] The Opinion of the Court of Appeals asserts that the parties were in agreement on this point. This assertion was not entirely correct. Appellants took the position that the Registration of Records Act is not a "perfection" statute and that the transfer was perfected at the time of delivery of the deed. However, it was acknowledged that the acquisition of unassailable rights occurred at the time the deed was recorded.

the application of Section 548 to invalidate a transfer of real estate in the Bahamas was an improper extraterritorial application of the statute. Secondly, relying on the doctrine of international comity, Petitioners argued that the application of § 548 was inappropriate, particularly in these circumstances, and that the Bankruptcy Court should decline to exercise jurisdiction to invalidate a real estate transfer which could not have been invalidated under the law of the *situs* country. In so doing, they took the position that the law of the *situs* was the only appropriate law for the invalidation of a real estate transfer and that the exercise of jurisdiction for this purpose by a foreign sovereign was improper.

The Bankruptcy Court disagreed, holding that § 548 could properly be applied to this transaction and further, that the Court should not refrain from exercising jurisdiction on the basis of international comity. The motion to dismiss was therefore denied. App. 46, 48.

The first of these holdings rested primarily on the belief that this property, which was not property of the debtor at the time Betty French's bankruptcy case was filed, was nevertheless property of the estate and thus subject to the exercise of *in rem* jurisdiction by the Bankruptcy Court. The principal authority cited in support of the holding was *Hong Kong and Shanghai Banking Corp, Ltd. v. Simon (In re Simon),* 153. F.3d 991 (9th Cir. 1990), one of a small group of cases in which it has been held that the exercise of jurisdiction to protect property of the estate does not involve extraterritoriality because such property is *in custodia legis* and thus, constructively at least, within the United States. As such, the Bankruptcy Court held, extraterritoriality was not an issue. The Bankruptcy Court further noted that there were a number of other situations in which various sections of the Code (other than § 548) had been applied

extraterritorially; and it found evidence of Congressional intent to exercise § 548 extraterritorially in the grant of worldwide jurisdiction over the debtor's property and property of the estate, citing 28 U.S.C. § 1334(e). Finally, as an additional basis for its holding on extraterritoriality, the Bankruptcy Court found that creditors would suffer harm if Section 548 could not be used to invalidate the transfer; and, therefore, that the matter fell within an alleged exception to the presumption against extraterritoriality, with reference to *Environmental Defense Fund, Inc. v. Massey,* 986 F.2d 528 (D.C. Cir. 1993).

The Bankruptcy Court also held that it would be improper to refuse to exercise jurisdiction based on considerations of international comity. First, the Bankruptcy Court noted that there was no competing proceeding to which it might defer; and secondly, the Court clearly felt that the most important factor in the analysis was the citizenship of the transferor and transferees, all of which were U.S. citizens over whom the Court had personal jurisdiction.

With the Bankruptcy Court having thus disposed of the questions of extraterritoriality and international comity, the Trustee moved for summary judgment, which the Bankruptcy Court granted after a brief hearing; cf. App. 35 and 37.

Petitioners appealed that judgment to the District Court, which then affirmed the Bankruptcy Court, including its refusal to dismiss the case, but on somewhat different grounds. The District Court suggested (without expressly holding) that the Bankruptcy Court was incorrect in ruling that the property was property of the bankruptcy estate, noting that this conclusion was contrary to the substantial weight of authority (including one of the Bankruptcy Judge's own opinions). App. 31. In

light of this, the issue of extraterritoriality could not be sidestepped by the device of a supposed exercise of worldwide *in rem* jurisdiction or a finding that the property in question was constructively within the United States, as the Ninth Circuit had done in *Simon*. The District Court thus resolved to take a "heads on" approach to the question, to search for evidence of Congressional intent, as this Court has mandated in its many opinions on the issue of the presumption against extraterritoriality. Having reached this point, however, the District Court was unable to find any actual evidence of intent one way or the other, other than the fact that, in its view, § 548 was an important cog in the great wheel of the Bankruptcy Code. On this factor alone, the District Court held that there was sufficient evidence of Congressional intent that § 548 should be applied extraterritorially because such a holding would make the section more effective. The decision was crafted to reach a result, the Court believing that a refusal to apply § 548 extraterritorially would amount to a license to wrongdoers to hide property from the estate and thus deliberately defraud creditors; even though, in the case at bar, the gift of property was entirely innocent.

In ruling on the question of international comity, the District Court gave great weight to the citizenship of the parties and to the fact that much of the conduct related to the transfer had occurred in the United States. Like the Bankruptcy Court, the District Court stated its belief that the exercise of international comity came into play only where there was a competing foreign proceeding to which the U.S. Court could defer. Giving little or no weight to the law of the situs, the District Court found that the contacts with the United States were so strong that there was no reason to refrain from exercising jurisdiction. App. 34.

The Petitioners appealed this decision to the Court of Appeals, which affirmed the judgment of the District Court, but once again relied on different grounds, at least insofar as the issue of extraterritoriality was concerned. Indeed, the Court of Appeals in its opinion touched on some of the issues that had been decided by the Bankruptcy Court and the District Court but then found that the questions decided there did not require a further decision. With respect to the question of property of the estate, on which Judge Schneider had primarily based his decision on extraterritoriality, the Fourth Circuit merely noted what it perceived to be a split of opinion among the courts which had considered the question. After some extended consideration of whether or not this case did in fact involve the extraterritorial application of Section 548, the Court of Appeals ultimately decided that this question also did not require a decision. Instead, much in the manner of the District Court, the Fourth Circuit held that the presumption against extraterritoriality was overcome, but once again with no citation to any direct or even inferential evidence of Congressional intent other than the perception that the extraterritorial application of Section 548 fit within the overall scheme of recovering avoidable transfers, a desirable goal from the point of view of creditors. Unlike the District Court, however, the Fourth Circuit placed primary reliance on an analysis of the language of § 548. Observing that § 548, which it said was linked to the definition of estate property in § 541, the Court of Appeals noted that § 548 was intended to permit the avoidance of transfers of property that *would have been* property of the estate if the transfer had not taken place, and it then concluded from this, but with no other evidence, that Congress had "made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, *wherever that property is located.*" App. 11 (emphasis added). The Court of Appeals also stated that, under the statutory scheme, creditors are "entitled to the

'interests of the debtor' in property" under § 541 and that "they may avoid a debtor's fraudulent transfer of the same 'interest[s] of the debtor in property' under Section 548." Thus, the Fourth Circuit concluded that Congress intended to provide for the avoidance of property in a foreign country and that the "evidence" of intent was sufficient to overcome the presumption.

On the question of international comity, the Fourth Circuit, like the lower courts, saw no competing proceeding to which a U.S. court might defer, thus apparently adopting the notion that the existence of such a proceeding is a *sine qua non* for application of the doctrine. The opinion concluded that, absent a competing proceeding, there was no way in which U.S. law and Bahamian law would clash. App. 15. But the Court nevertheless undertook an analysis of the factors which should be taken into account where international comity is an issue. Basing its analysis on the factors mentioned in Restatement (Third) of Foreign Relations Law of the United States § 403 and Justice Scalia's dissenting opinion in *Hartford Fire Insurance v. California,* 509 U.S. 764 (1993), the Court of Appeals concluded that other factors present in this case outweighed the usual rule that the law of the situs is applied in questions concerning title to real property.

In analyzing the problem, the Fourth Circuit did not view the application of the situs rule as mandatory "when a case involves the definition of property interests," and instead it adopted an approach which it believed was suggested by the Restatement (Second) of Conflict of Laws ch. 9, topic 2, introductory note, to the effect that the situs law might not govern in a case involving "the allocation of interests in land [between]...debtor and creditor" if "regulation of the relationship is of greater concern to a state other than the situs." This, the Court of Appeals said, is particularly

true when the land in question is part of an "aggregate." App. 14. Finding that the United States had a greater interest "in regulating this transaction" than the Bahamas, and finding that the property was part of an "aggregate," i.e., the bankruptcy estate, the Court of Appeals rejected the application of international comity to this case.

On these grounds, the Fourth Circuit affirmed the decision of the District Court.

REASONS FOR GRANTING THE PETITION

A. A Case of First Impression is Presented, yet many Prior Decisions of this Court Point the Way, and the Court of Appeals has Departed from Them, thus Working a Major Change in the Law Concerning Extraterritorial Exercise of Jurisdiction.

The specific issues raised in this case have never been decided with respect to § 548 of the Bankruptcy Code in any previous reported case, issues of great importance not only to these litigants but to the country.[3] In fact, the only reported case dealing with the extraterritorial application of a bankruptcy trustee's avoidance powers under the Code is *In re Maxwell Communications Corp.*, 170 B.R. 800 (Bkrtcy. S.D. N.Y. 1994)("Maxwell I"), *affirmed* 186 B.R. 807 (S.D. N.Y. 1995)("Maxwell II"), *affirmed* 93 F.3d 1036 (2d Cir. 1996)(affirmance only on the basis of international comity). The facts and issues presented in *Maxwell*

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[3] This point is underscored by the fact that every decision on the merits of the issues raised herein has been published by the issuing court.

Communications were significantly different from those of this case and so, unfortunately, those decisions offer only limited guidance.[4]

The prior decisions of this Court, however, do point the way. Some 155 years ago, in *Oakey v. Bennett,* 52 U.S. 33, 13 L. Ed. 593 (1851), this Court declared that the use of a United States bankruptcy statute to invalidate the title to real property in a foreign country – Texas, during the time in question – was an "extraterritorial" action forbidden by the longstanding rule that the one sovereignty could not "regulate the conveyance of real estate in a foreign government" and, in doing so, stated that "[t] here is no pretence that this government, through the agency of a bankruptcy law, could subject the real property in Texas, or in any other foreign government, to the payment of debts."

Manifestly, though the precise methods may have varied as new bankruptcy statutes were enacted, the interest of the United States in adjusting the affairs of creditors and debtors is much the same as it was in 1851. A comprehensive national bankruptcy act had been passed just 10 years before *Oakey* in recognition of the importance of that interest. Yet, in the face of such an interest, it was understood that bankruptcy jurisdiction was not without limit. Now, in this case, the Court of Appeals has said that § 548 can be utilized to do the very thing this Court said could not be done. The idea that such a thing is even possible has enormous implications,

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[4] *Maxwell Communications* was concerned with alleged preferential transfers of funds and did not involve real property. Consequently, the analysis in the lower courts of whether or not application of § 547 of the Code to avoid the transfers would be extraterritorial action was very different from that involved here. In addition, in *Maxwell Communications,* there was a competing proceeding in a foreign country, a fact which impacted the question of international comity. In affirming the judgment of the District Court, the Second Circuit expressly did not decide the issue of extraterritoriality.

not only for the administration of bankruptcy cases, but in many other conceivable scenarios.

The decision of the United States Court of Appeals for the Fourth Circuit has altered the landscape of how our courts will adjudicate disputes concerning title to foreign property in a fundamental way, rejecting the application of a rule that has been applied in this country, by this Court and many others, for nearly 200 years, and in other countries for a still longer time. In taking such action, the Fourth Circuit has effectively abandoned basic principles of jurisprudence and has failed to follow the method of analysis mandated by this Court to determine when a United States statute may be applied beyond our borders. By this decision, the Court of Appeals has expanded the jurisdiction of our bankruptcy courts, arguably of all federal courts, in a manner which very likely will be offensive to friendly foreign governments. Finally, by this action, the Court of Appeals has refused to accord the benefit of international comity in a way that is contrary to basic principles of conflict of laws and international relations; and it has justified this decision based on a theory which makes no sense given the particular facts of this case.

Numerous prior decisions of this Court, notably *Clarke v. Clarke,* 178 U.S. 186, 20 S. Ct. 873, 44 L. Ed. 1028 (1900) and *Fall v. Eastin*, 215 U.S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (1909), but going back as far as *United States v. Crosby,* 7 Cranch 115 (1812), have embraced and perpetuated the rule, taken from English common law, that the courts of one sovereignty may not act *directly* to affect the title to real estate located in another sovereignty. This rule is rooted in practicality, in the simple fact that, ultimately, the country in which real estate is situated holds all ultimate control over its title and disposition, no matter what the courts of another

jurisdiction may say.[5] This rule circumscribes the permissible limits of *in rem* jurisdiction and thus goes beyond issues of statutory construction, and it was effectively rejected or ignored in the present decision of the Court of Appeals.

B. The Decision of the Court of Appeals Misapplied, or Failed to Apply, the Standards for the Analysis of Extraterritoriality Mandated by Numerous Decisions of this Court.

The first question raised in the appeal below was whether or not § 548 of the Bankruptcy Code could be applied extraterritorially to nullify the Petitioners' otherwise undoubted title to real property in the Bahamas. In deciding this issue, the Fourth Circuit paid lip service to the rule that a federal statute is presumed to have domestic application only in the absence of clear evidence of Congressional intent to the contrary. Yet it did not actually apply the presumption as this Court has defined it in several decisions and instead ruled that § 548 could be applied extraterritorially despite a total lack of actual evidence that this was what Congress intended.

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[5] A leading English treatise put it this way:

> The sovereign of the country where land is situate has absolute control over the land within his dominions; he alone can bestow effective rights on it; his courts alone are, as a rule, entitled to exercise jurisdiction over such land. Consequently, any decision by an English court which ran counter to what the lex situs had decided or would decide would be in most cases a *brutum fulmen*.

Dicey and Morris, *The Conflict of Laws (2- Ed. 1987)*, Rule 118; App. 129-30. A "brutum fulmen" is an obscure Latin phrase generally translated to mean a harmless threatening or innocuous thunderbolt (cf. www.winikopedia.com).

First, in a preliminary way, the Fourth Circuit questioned whether or not the application of § 548 to invalidate Petitioners' title actually amounted to extraterritorial application of the statute, despite the fact that this Court, in *Oakey v. Bennett,* used the term "extraterritorial" to describe the analogous application of the 1841 bankruptcy law to foreign real estate.[6] Indeed, the idea that such an exercise of jurisdiction is extraterritorial was the whole point of *Fall v. Eastin* and a host of similar cases.[7] Secondly, again preliminarily, the Court of Appeals considered a legal fiction utilized in a few of the reported cases in which it was held that the exercise of *in rem* jurisdiction is proper and not extraterritorial where the property in question is property of the bankruptcy estate within the meaning of § 541, because such property is within the court's custody and therefore, in a technical sense, within the United States. In the end, however, the Fourth Circuit declined to decide the issue on that ground. Instead, the Fourth Circuit held that the presumption against extraterritoriality was overcome by what it described as "several indicia of Congressional intent." App. 9.

What was this evidence? There is no statement in the statute itself to indicate such Congressional intent.

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[6] As the Court also did in *Clarke*; 178 U.S. at 194. The Court of Appeals speculated that the term "extraterritorial" should perhaps apply only where the conduct which the statute seeks to regulate occurred primarily outside of the United States. Such a definition might make sense with regard to a statute exclusively concerned with the conduct of persons, but it does not work where the subject matter is title to real property.

[7] The structure of the Bankruptcy Code compels the exercise of *in rem* jurisdiction by breaking the "avoidance" of the transaction (under § 548) and the recovery of the property or its value (under § 550) into separate sequential steps. No order can be entered with respect to the ultimate remedy of "recovery" until the transfer has first been invalidated.

There is nothing in the legislative history to indicate such intent. There are no administrative decisions to indicate such intent. There are no reported decisions (until this case) in which such intent has been found. Indeed, the Bankruptcy Court and the District Court in *Maxwell Communications I* and *II* found a notable absence of evidence of Congressional intent with regard to § 547, and there is nothing in § 548 which would distinguish it insofar as this point is concerned.

The prior decisions of this Court have established that the question of extraterritoriality depends on whether or not the intent of Congress, as it appears from all available evidence, is "*clear.*" *Smith v. United States,* 507 U.S. 197, 203, 113 S. Ct. 1178, 1183, 122 L. Ed. 2d. 548, 555 (1993). To overcome the presumption, there must be "affirmative evidence of intended extraterritorial application." *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 176 and n.32, 113 S. Ct. 2549, 2561, 125 L. Ed. 2d. 128, 148 (1993). If there is no evidence of intent, or if the evidence of intent is not clear, then the statute may be applied domestically only.[8] The Fourth Circuit's decision departed significantly from this rule.

It is clear that the Court of Appeals, like the District Court, was deeply troubled by the possibility that the restriction of § 548 to domestic application, insofar as real estate was concerned, amounted to a loophole in bankruptcy enforcement which, to the thinking of the Court, was intolerable. This, indeed, was the main reason the District Court had held the presumption to

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[8] Two commentators relied on by the Respondent below who have argued passionately for extraterritorial application of the Bankruptcy Code (as a whole) concluded, in the end, that the evidence of Congressional intent on this issue was "less than clear" and that Congress should act to clarify the matter. Cf. David M. Green and Walter Benzija, *Spanning the Globe: The Intended Reach of the Bankruptcy Code,* 10 Am.Bankr.Inst.L.Rev. 85 (Spring 2002), App. 139.

have been overcome.[9] Thus, the Fourth Circuit embarked on a difficult and confusing comparison of the language of § 541 with similar language in § 548 to suggest, in effect, that Congress intended the worldwide jurisdiction provided as to estate property in 28 U.S.C. § 1334(e) to be exercised here as well, even if the property in question might not actually be property of the estate (a point which the Fourth Circuit explicitly did not decide).

In its analysis, the Fourth Circuit noted, first of all, that the term "property of the estate" as defined in § 541 refers to foreign as well as domestic property. Next the Court of Appeals took note that "property of the estate" includes all interests of the debtor in property and that § 548 authorizes a trustee to avoid a transfer of property that would have been property of the estate had the transfer not occurred. These points, of course, are obvious from a plain reading of the statutes. The Court of Appeals then observed that the term "an interest of the debtor in property," as it appears elsewhere in the Code, refers to the same kinds of interests described by the term "property of the estate." From this alone, the Fourth Circuit leaped to the conclusion that

> Through this incorporation, Congress made manifest its intent that §548, absent a prepetition transfer, would have been

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[9] The District Court believed that Congress *must* have intended to avoid such a loophole because the avoidance powers are so "key provisions" in bankruptcy administration. This belief alone constituted the "evidence" by which the District Court held that the presumption against extraterritoriality had been overcome; cf. App. 31. Like the Fourth Circuit decision, this conclusion was based on an assumption and not on actual evidence of intent. It was also clear that the District Court's concern related to *deliberate and intentional fraud* as opposed to constructive fraud. Plainly the same thinking colored the Fourth Circuit's decision, which referred to Betty French, the giver in this totally innocent transaction, as the "perpetrator" of the fraud. App. 6.

> property of the estate, *wherever that property is located.*

App. 11 (emphasis added). Then, finding that such an interpretation was in accord with the overall purpose of the avoidance provisions, "which is to prevent debtors from illegitimately disposing of property that should be available to their creditors," the Court of Appeals concluded that "[i]n furtherance of this purpose" Congress provided that the "interests of the debtor in property" as utilized in § 541 – wherever located – and thus "demonstrated an affirmative intention" to authorize avoidance of transfers of foreign property which "but for a fraudulent transfer, would have been property of a debtor's estate." App. 11.

This giant leap, essentially a *non sequitur,* is devoid of support in logic or in the statutory framework.

Plainly it does not amount to the kind of evidence required to overcome the presumption against extraterritoriality. Section 547(b) also contains the word "transfer" and is clearly meant only to define the types of transfer that may be avoided. However, nothing in § 547(b) or in § 548, where the same phrase appears, suggests that the interest in property, *having been transferred,* is property of the estate at the time the avoidance action is filed or that such property is subject to the exercise of worldwide jurisdiction under 28 U.S.C. § 1334(e). The "linkage" between § 541 and the avoidance sections merely defines the kinds of property transfers that may be subjected to avoidance, i.e., transfers of property that *would have been* property of the debtor but for the transfer. This is not evidence that Congress intended to exercise jurisdiction extraterritorially in aid of the avoidance sections.

The grant of jurisdiction in § 1334(e) of Title 28 is carefully circumscribed and subject to strict construction. Property belonging to third parties is not "property of the debtor" or "property of the estate." Section 541 includes, as estate property, "property recovered" by a trustee as the result of an avoidance action; but the logical construction of such a provision based on plain language is that such property which has been transferred to a third party prepetition becomes "property of the estate," and thus subject to worldwide jurisdiction, only *after it has been recovered.* If Congress had intended to extend worldwide jurisdiction to property which had been transferred, and not yet recovered, surely it would have said so.

Significantly, the words "wherever that property is located" which the Court of Appeals believes should apply to avoidable transfers do not appear in Section 547 or in Section 548. The omission of such language, if anything, indicates Congressional intent to the contrary; cf. e.g., *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 588, 112 S. Ct. 2130, 2151, 119 L. Ed. 2d 351, 382 (1992)(Stevens, J., concurring).

The argument against the interpretation by the Fourth Circuit is even stronger because the case involves extraterritorial application of § 548 to invalidate a title to real property. This Court has repeatedly noted that "Congress legislates against the historical backdrop of the presumption against extraterritoriality," and if it wishes to authorize the extraterritorial exercise of jurisdiction, it is aware that there must at least be clear evidence to support that intent, if not express language in (or from) the statute itself. Congress knows how this must be done. Cf. *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 440, 109 S. Ct. 683, 102 L. Ed. 2d. 818 (1989). A failure to express such intent is strong evidence that Congress did not intend to authorize extraterritorial

application of a statute. Congress also legislates against the backdrop of this Court's previous decisions on the exercise of jurisdiction and, in matters involving extraterritoriality, with some regard to the norms and principles of conflicts of law and international comity. Yet the Court of Appeals utterly failed to note the historical force of the rule against the extraterritorial application of *in rem* jurisdiction to foreign real estate or its possible significance to the issue. The ideas expressed in *Fall v. Eastin* and perhaps most significantly in *Oakey v. Bennett* also reflect the positions taken by many other countries, including the Bahamas and other British Commonwealth countries. Does it not stand to reason that, knowing these things, Congress would have expressed its intent more clearly if it had actually intended to authorize the exercise of *in rem* jurisdiction in this manner?

The Fourth Circuit also failed to take note of, or at least does not mention, that there is evidence in the construction of the Code suggesting that there was no intent to apply § 548 extraterritoriality. Along with § 548, the Code contains Section 544, App. 72, which authorizes a Trustee, when he thinks it desirable or necessary, to go into a state or foreign court and seek avoidance of a fraudulent transfer under local law. Such action would not have been successful under the facts of this particular case, but that does not alter the fact that Congress recognized there were occasions when local law might provide a necessary remedy. Further, the enactment of numerous sections of the Code dealing with ancillary proceedings in foreign courts, including some amendments which just became effective, indicate that Congress was aware of the possible need to provide for the administration of property in a foreign setting, yet it took no action to provide for the extraterritorial application authorized here by the Court of Appeals.

There is considerable confusion in the few reported cases as to when it is permissible for a Bankruptcy Court to exercise its jurisdiction extraterritorially. To a large degree, courts considering such matters have evaded an orthodox examination of Code sections in light of the presumption against extraterritoriality. These cases have tended to be very result-oriented and are typified by the use of procedural gyrations or resort to legal fictions to avoid the presumption entirely. Some, such as *Simon,* have upheld the exercise of jurisdiction by finding that the property in question – always personal property – was property of the estate and therefore constructively always within the United States even though it may physically be located in another country. Another theory utilized in *Simon* was the fact that there, the party in question had voluntarily participated in the bankruptcy case. Other cases have authorized extraterritorial application as a necessary adjunct to basic bankruptcy jurisdiction, such as the ability of a court to enforce its own injunctions or the automatic stay; *see, for example, Nakash v. Zur (In re Nakash),* 190 B.R. 763 (Bkrtcy. S.D. N.Y. 1996)(enforcement of the automatic stay). But, until now, there have been no such cases involving the title to foreign real property; and no cases have attempted, until this one, to extend the Court's jurisdiction based on a "frontal" approach to the presumption against extraterritoriality, as the District Court put it. App. 31.

A major area of apparent confusion that affected both the District Court decision and the Fourth Circuit decision, and one which the Fourth Circuit mentioned but did not squarely decide, is the jurisdictional line that divides estate property from non-estate property. Both of these Courts failed to implement that distinction in their thinking. Both felt that the need to gather the assets of the debtor for distribution to creditors provided primary impetus to the bankruptcy system as a whole, and they

both relied on case authority to that general effect to buttress their core belief that the only way to implement the Code effectively was to treat estate property and non-estate property as both being within worldwide jurisdiction. Yet in drafting 28 U.S.C. § 1334(e), Congress plainly draws a jurisdictional line between estate property and non-estate property, and it carried that distinction into § 541 by including property that had been the subject of a fraudulent or preferential transfer only *after* it had been recovered under § 550. As part of the overall controversy, Petitioners believe that this Court can do a great service by clarifying this issue, which the Court of Appeals expressly did not decide but which was nevertheless a central aspect of its thinking. A decision on this point may be unavoidable.

The great importance of the question of extraterritoriality and the fact that it has never previously been decided as to § 548; the fact that the Fourth Circuit's analysis and decision are in conflict with numerous cases of this Court limiting the use of *in rem* jurisdiction to affect the title to foreign real estate; the fact that the Fourth Circuit has failed to follow the methodology prescribed by this Court for analysis of extraterritoriality and, that, to the extent it has attempted to follow that method, it has done so incorrectly; the fact that a decision of this kind is likely to be unenforceable as a practical matter, because it will be rejected by the foreign sovereign; and the fact that there is such confusion generally in the cases on extraterritorial applications of various sections of the Bankruptcy Code; and the fact that numerous unsettled subsidiary issues, such as the question of whether or not property subject to an avoidance action should be treated as estate property for jurisdictional purposes (on which the Fourth Circuit saw a split among the circuits), all indicate that review by this Court would be appropriate and extremely beneficial.

C. The Court of Appeals Misapplied the Standards for Analysis of the Question of International Comity by Failing to Give Due Weight to the Law of the Situs and By an Inappropriate Restriction on Application of the Doctrine.

Though they are not the same, the question of extraterritoriality and that of international comity are certainly interwined. Apart from the practical reasons which underly this Court's many decisions limiting the exercise of *in rem* jurisdiction, such as *Oakey v. Bennett*, *Clarke v. Clarke,* and *Fall v. Eastin,* there is also the consideration of comity. This is one of the main reasons that the presumption of extraterritoriality exists, "to avoid unintended clashes" between our law and the law of other countries; cf. *Foley Bros., Inc. v. Filardo,* 336 U.S. 218, 285, 69 S. Ct. 575, 577, 93 L. Ed. 680, 683 (1949); also *Equal Opportunity Commission v. Arabian American Oil Co.,* 499 U.S. 244, 249, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991). Congress is understood to have taken this into account when it enacts legislation; *Hartford Fire, supra,* 509 U.S. at 814-5 (Scalia, J., dissenting).

Petitioners had argued that the interest of a foreign sovereign in the control of real property within its borders and the force of the *lex situs* rule overrode all other considerations, that the exercise of in rem jurisdiction to invalidate the title to real estate located in a foreign country was impermissible and wrong and would be offensive to the foreign country involved. Like the District Court, however, the Fourth Circuit saw little force in the arguments of the Petitioners, primarily because the Petitioners themselves are U.S. citizens and, to some extent, because some of the events surrounding the transaction in question took place in the United States. In effect, the Fourth Circuit and the District

Court did not perceive a governmental interest by the Bahamas in the outcome of this case, and so both refused the Petitioners' request that they decline to exercise jurisdiction on grounds of international comity. Further, they believed that the interests of the United States overrode those of the Bahamas.

In its analysis, the Fourth Circuit first referred to the Restatement (Third) of the Foreign Relations of the United States, Section 403(1), which lays down a number of factors that may be considered in analysis of an international comity question; *see Hartford Fire (Scalia, J., dissenting).* The use of such factors, in general, comports with the general principle of conflict of laws utilized by federal courts in cases involving personal property, i.e., a consideration of contacts with the jurisdictions involved. But in a case where title to real estate is at issue, the *lex situs* becomes the one factor that overwhelms all others.

Rejecting this approach, the Fourth Circuit attempted to employ an "interests" analysis to the question, greatly diminishing the force of the *lex situs* rule in one stroke. Indeed, the Court of Appeals regarded that as having little force. Instead, the Court of Appeals relied on Restatement (Second), Conflict of Laws, ch. 9, topic 2, introductory note, for the principle that the *lex situs* rule "need not govern 'the allocation of interests in land [between]...creditor and debtor' if 'regulation of the relationship is of greater concern to a state other than the *situs*.'" Further, the Fourth Circuit noted that there were situations "'when the land is part of an aggregate of property which it is desirable to deal with as a unit'" when the *lex situs* has not been applied. The Fourth Circuit then had little difficulty finding that there was a paramount U.S. interest here and that the property in question was part of an "aggregate," which it defined as "the bankrupty debtor's estate." App. 14.

This analysis, unfortunately, was predicated on a significant distortion of the principles discussed in the referenced introductory note to Section 9 of the Restatement. The Restatement Note itself does not suggest that a weighing of competing governmental interests by the *forum* court, according to the *law of the forum*, is appropriate when the title to real estate is at issue. What it says plainly is that the forum court must make its determination *according to the choice of laws rule that the situs court would apply.* This is entirely in accordance with the general principle set forth in Restatement (Second), Conflicts of Laws, § 223, to effect that the law of the situs is the paramount law governing case involving title to real estate. And it can hardly be doubted that, in this case, a Bahamian court would apply strictly the law of the *situs*, as that rule is firmly established in English law and in the law as applied throughout the Commonwealth.[10]

Indeed, the Introductory Note on which the Fourth Circuit's entire argument is based acknowledges that, "[i]n most instances, the courts of the situs would decide

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[10] The Bahamas, as a British Commonwealth country, has its own statute laws but is otherwise a common law jurisdiction. Decisions of the Queen in Council (the Privy Council) are binding law; other English and Commonwealth decisions, however, are looked to as precedent as the Bahamas has relatively few reported cases. One Commonwealth case that resonates clearly here is *Duke v. Andler,* [1932] 4 D.L.R. 529 (Supreme Court of Canada, 1932), reproduced at App. 78. There the issue before the court was whether or not to give effect to a California judgment that the defendants, California residents, had fraudulently transferred property in British Columbia. The plaintiffs (also California residents) had secured a judgment to that effect; and the California Court had ordered the defendants to reconvey the property. When they refused, the California court appointed a commissioner to execute a deed on behalf of the defendants, and the precise question in *Duke v. Andler* was whether or not to give effect to that deed. Applying Canadian law, which it said must govern in such a case, the Supreme Court held that no California court had jurisdiction to determine the title to real estate in Canada, regardless of the citizenship of the parties. *See particularly* App. 90-5.

the case in accordance with their own local law." This will certainly be the case where the question is involves "issues as to who may own the land....The state of the situs has the dominant interest in the determination of such issues and its local law should be applied." The rare exceptions to the rule, where the Introductory Note recognizes some circumstances in which the *situs* court might decide otherwise, involve technical or procedural matters or matters of substance that do not actually involve title to the property and in which the situs court would likely defer to the law of another jurisdiction. It is within the context of these remarks that the Introductory Note mentions, as one example, the situation where the disposition of land as part of an aggregate of property may be desirable. The Fourth Circuit seized on this language to justify its decision on international comity, defining the "bankruptcy debtor's estate" as such an "aggregate." Yet common sense tells that this is not what the Introductory Note was referring to. The fact that that several properties may be under common ownership or even under common administration by a successor does not necessarily make them "an aggregate." This is true of bankruptcy estates as well, which are frequently liquidated piecemeal. In fact, there was nothing in the circumstances of this case to suggest that it would be necessary or desirable for the Bahamas property to be disposed of in a sale of property in the "aggregate." The Fourth Circuit reached its conclusion in the abstract, without any evidence on this point.[11]

The extent to which the Fourth Circuit departed from the substance of the Restatement while claiming to rely on it is perhaps best illustrated by one of the examples set forth in the Note: that of a case in which a deed is delivered in state Y respecting property in state X

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[11] There was no evidence whatsoever as to the components of Betty French's bankruptcy estate.

which was alleged to be in fraud of creditors in state Y. Such a case, according to the Restatement Introductory Note, would be decided by the law that would have been applied by the X courts. In this case, of course, the Fourth Circuit effectively applied the law of Y.

At the same time, the Fourth Circuit opined that there was no actual danger of a clash of laws because, in this case, there was no competing proceeding in the Bahamas to which the court might defer. By this, the Fourth Circuit suggests that the clash of laws is an illusion and that international comity does not come into play absent a competing proceeding. However, in fact, the clash has already occurred; as persons entitled to the protection of a foreign law, cf. *Hilton v. Guyot,* 159 U.S. 113, 163-4, 40 L. Ed. 95, 16 S. Ct. 139 (1895), the Petitioners are entitled to rely on that law whether or not a competing proceeding now exists. There is no legitimate reason why the Petitioners should be denied the protection of that law on account of their citizenship. As Justice Scalia pointed out in his dissent in *Hartford Fire,* the doctrine of "prescriptive comity" depends on an analysis of the *relative interests of the countries involved;* 509 U.S. at 818. It is essential, therefore, to consider the importance of the issues *seen from a Bahamian point of view.*

Moreover, an eventual clash in a Bahamian court is highly likely if not inevitable. In practical terms, if the Trustee were to take title under this decision and then attempt to sell the property, his title would certainly be clouded; the controversy is bound to arise at some point, just as it would have done here, had the land been located here, by a simple title search performed at the request of the buyer or the buyer's lender. The Commonwealth of the Bahamas is not a signatory to any treaty with respect to the enforcement of U.S. judgments. Consequently, under Bahamian law, a party seeking to rely on a U.S.

judgment must file suit in a Bahamian court and either establish rights anew or persuade the Bahamian court to honor the foreign judgment. A Bahamian Court, however, is not likely to recognize the jurisdiction of a United States Court to adjudicate the title to Bahamian real estate; cf. *Duke v. Andler, supra.* The clash of laws is here now and would be unavoidable in the future.

There are significant differences between Bahamian avoidance law and United States avoidance law, and under Bahamian law, the transfer at issue here could not be invalidated. The only statute under which a transfer can be set aside as fraudulent, under Bahamian law, is the Fraudulent Dispositions Act, 1991, App. 109. That law applies only in cases involving transfers that were intended to defraud creditors. There is no such thing, in Bahamian law, as a "constructively" fraudulent transfer. Moreover, there is no such thing as a "deemed" date of transfer; the transfer presumably occurs when it is completed under local law; and, under Bahamian law, which follows English law, the transfer of ownership of real property is complete when a deed has been delivered; cf. Odgers, *The Construction of Deeds and Statutes (3d Ed. 1951),* App. 140. Recordation of a deed is not required to achieve a valid or complete transfer of real property; *see Stewart Estate v. Cartwright,* [2001] BHS J No. 60 1999 No. 1375 (Bahamas Supreme Court, Equity Side, 2001), App. 104, in which the only question in determining the validity of an unrecorded deed of gift to real estate was the issue of delivery. Consequently, insofar as Bahamian law is concerned, the transfer of property in this case occurred in 1981, not 2000. Given that the Fraudulent Dispositions Act has a two-year limitations period, App. 110, the action would be barred. Moreover, although the Trustee might be regarded in the Bahamas as a representative of the bankruptcy estate, he would not be accorded extraordinary powers such as he is entitled to under the Bankruptcy Code as English and

Commonwealth countries typically do not recognize such powers; *see, e.g., Galbraith v. Grimshaw,* [1910] A.C. 508, App. 96 (House of Lords, 1910), App. 96, holding that a Scottish bankruptcy trustee has no extraordinary powers in an English court.

The sum of all this is that a U.S. bankruptcy trustee could not prevail in a Bahamian court on an action brought under § 548, nor, indeed, in any action to avoid a constructively fraudulent transfer; and moreover, even if suit were brought on an intentionally fraudulent transfer, this would have to be done within limitations. However, a proper case to avoid such a transfer could be brought in the Bahamas pursuant to § 544 of the Code.

The existence of Section 544 answers one of the concerns that has permeated this case at all levels, which is quite simply the perceived existence of an unacceptable "loophole." While it may not be a perfect remedy from the perspective of the Court of Appeals, it does, at least, offer the possibility of a solution without offending basic concepts of jurisdiction or international law. Whether or not a trustee can prevail will depend on circumstances of the particular case. Whether or not it is economical for a Trustee to pursue such a case in a foreign forum is likewise case-specific. It may be that Section 544 affords an imperfect and more expensive choice than § 548, but at least it has the advantage of avoiding problems with enforcement and of eliminating any possible conflict of laws.

On a more fundamental level, it is not the business of the courts to fashion remedies for perceived "loopholes" in federal statutes, even though on policy grounds they may have legitimate reasons for concern. It is all too obvious from the verbiage adopted by the Fourth Circuit that the major concern was with the prevention or avoidance of intentionally fraudulent transfers, which

were not at issue in this case and which could have been set aside under local law had an action been timely brought. That concern, however legitimate, does not justify a decision supporting the exercise of extraterritorial jurisdiction to invalidate a completely innocent transfer of real property in a foreign country. Several different possible solutions may exist to solve the problem of intentionally fraudulent transfers without affecting the rights of transferees in an innocent transaction. This Court has never hesitated to point out problems and invite the attention of the Congress to fashioning a solution.

CONCLUSION

This case presents numerous issues of great importance. In this factual scenario, and with respect to § 548, they are issues of first impression in an area of law in which the reported cases nationwide evidence no clear approach or answer. This alone indicates that the questions presented should be reviewed by this Court. Yet the approach taken by the Court of Appeals also raises yet more troubling questions, as that Court appears to have abandoned some 200 years of jurisprudence and many decisions of this Court in order to reach its result. The Fourth Circuit's analysis of extraterritoriality is at odds with the well-established rule that compels a court to consider whatever actual evidence of Congressional intent exists, to base its decision only on actual evidence of intent, and to withhold extraterritorial application of the law where the intent of Congress is unclear. It is also contrary to a number of decisions in which this Court has held that the exercise of jurisdiction by one sovereignty or state to invalidate title to real property located elsewhere is improper. It has applied improper standards of analysis to the question of international comity and, in doing so, has apparently misinterpreted and misapplied the approach laid down by

the principal authority on which it relies. To address these issues and rectify the problems posed by the decision below, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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